



Original: English

No.: ICC-02/05-01/20

Date: 7 February 2022

**TRIAL CHAMBER I**

**Before:** Judge Joanna Korner, Presiding Judge  
Judge Reine Alapini-Gansou  
Judge Althea Violet Alexis-Windsor

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.*  
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

**Public**

**Public Redacted Version of “Prosecution’s third application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0010, P-0016, P-0039 and P-0040” 2 February 2022, ICC-02/05-01/20-571-Conf**

**Source:** Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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## I. INTRODUCTION

1. Pursuant to article 69(2) and 69(4) of the Rome Statute (“Statute”) and rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”): (i) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)<sup>1</sup> of P-0010, P-0016, P-0039 and P-0040 (“Four Witnesses”); (ii) designate the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations required pursuant to rule 68(2)(b)(ii) and 68(2)(b)(iii); and (iii) authorise remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic<sup>2</sup> (“Application”).<sup>3</sup>

2. Granting the Application would serve the interests of justice by enhancing the expeditiousness of the proceedings, obviating the unnecessary appearance of witnesses and saving valuable court time and resources.

3. As submitted, the Prior Recorded Testimonies of the Four Witnesses do not concern the acts and conduct of Mr Abd-Al-Rahman.<sup>4</sup> They relate primarily to the background of the armed conflict in Darfur and the contextual elements of crimes against humanity.<sup>5</sup>

4. As set out below, the Prior Recorded Testimonies of the Four Witnesses are relevant, reliable and probative. The introduction into evidence of these testimonies is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, as they do not concern the acts or conduct of Mr Abd-Al-Rahman, relate to issues that are not

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<sup>1</sup> Annex A (A1 to A4) lists the Prior Recorded Testimonies of the Four Witnesses which consist of their witness statements (at Part I) and associated material (at Part II). The material related to the witnesses’ prior recorded testimony which the Prosecution does not seek to introduce into evidence, is also included (at Part III), where applicable. Hyperlinks to this material are also included. See Conduct of Proceedings Directions, [ICC-02/05-01/20-478](#), para. 47.

<sup>2</sup> *Al Hassan* Rule 68(2)(b) Decision, [ICC-01/12-01/18-1111-Red](#), para. 18.

<sup>3</sup> This Application is submitted in accordance with the [Conduct of Proceedings Directions](#), paras. 46-48.

<sup>4</sup> The Prosecution excluded those portions in the Prior Recorded Testimonies that go to the acts and conduct of Mr Abd-Al-Rahman, as set out below.

<sup>5</sup> [Confirmation Decision](#), p. 50-51.

materially in dispute, are of a cumulative or corroborative nature and have sufficient indicia of reliability.<sup>6</sup>

## II. CLASSIFICATION

5. Pursuant to regulation 23bis(1) of the Regulations of the Court, this Application and its Annex A are filed as confidential, because they contain sensitive information regarding the identities of the Four Witnesses. A public redacted version of the Application will be filed as soon as practicable.

## III. SUBMISSIONS

6. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(b) of the Rules, as set out in the first application under rule 68(2)(b).<sup>7</sup>

### A. Overview of the Prior Recorded Testimonies of P-0010, P-0016, P-0039 and P-0040

7. The Prior Recorded Testimonies of the Four Witnesses relate primarily to the contextual elements of crimes against humanity.<sup>8</sup>

8. In addition to the statements of the Four Witnesses, the Prosecution seeks to introduce into evidence the associated material for each of the Four Witnesses. This material, which forms an integral part of their Prior Recorded Testimonies, is listed in Annex A to the Application<sup>9</sup> and described in greater detail below.

#### (i) *Prior Recorded Testimony of P-0010*

9. The Prosecution seeks to submit into evidence P-0010's prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0010's prior recorded testimony consists of one witness statement and

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<sup>6</sup> Rule 68(2)(b)(i) of the Rules.

<sup>7</sup> First Rule 68(2)(b) Application, [ICC-02/05-01/20-565-Red](#), paras. 6-8.

<sup>8</sup> [REDACTED].

<sup>9</sup> See Annex A (Part II of A1 to A4). Where applicable, the Prosecution includes the English translations of items in the list of Associated Material.

21 associated items that relate to information and events discussed in the statement. P-0010's prior recorded testimony is relevant to, *inter alia*, the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population.<sup>10</sup>

10. P-0010, a Fur housewife, provides direct eyewitness testimony regarding the attacks by Government of Sudan ("GoS") Forces<sup>11</sup> and the Militia/*Janjaweed* on Arawala in December 2003.<sup>12</sup> P-0010 describes the crimes committed by GoS Forces and the Militia/*Janjaweed* during the Arawala attack, including torture,<sup>13</sup> murder,<sup>14</sup> pillaging,<sup>15</sup> destruction of property,<sup>16</sup> displacement of civilians,<sup>17</sup> sexual and gender based violence and [REDACTED],<sup>18</sup> [REDACTED].<sup>19</sup>

11. P-0010's associated material consists of: (i) 15 photographs depicting the [REDACTED];<sup>20</sup> (ii) a list of the photographs the Prosecution took of P-0010;<sup>21</sup> (iii) an interpreter's certification;<sup>22</sup> (iv) a map of Arawala drawn by P-0010 during her interview;<sup>23</sup> (v) a map of the areas surrounding Arawala drawn by P-0010 during her interview [REDACTED];<sup>24</sup> (vi) P-0010's drawing of a gun held by one of the people who attacked her in Arawala;<sup>25</sup> and (vii) P-0010's drawing of a gun used by another individual [REDACTED] in Arawala.<sup>26</sup>

(ii) *Prior Recorded Testimony of P-0016*

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<sup>10</sup> [REDACTED].

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

12. The Prosecution seeks to submit into evidence P-0016's prior recorded testimony, including the associated material listed in Annex A (A2) to this Application. P-0016's prior recorded testimony consists of one witness statement and one associated item that relates to information and events discussed in the statement. P-0016's prior recorded testimony is relevant to, *inter alia*, the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population.<sup>27</sup>

13. P-0016, a Fur civilian, provides testimony on the attack by GoS Forces and the Militia/*Janjaweed* on Arawala in December 2003.<sup>28</sup> The witness describes the crimes committed during the Arawala attack, such as murder, including [REDACTED],<sup>29</sup> pillaging,<sup>30</sup> destruction of property,<sup>31</sup> displacement of civilians<sup>32</sup> and persecution.<sup>33</sup> P-0016 was [REDACTED].<sup>34</sup>

14. P-0016's associated material consists of a sketch of Arawala that she drew during her interview depicting the garrison where she was detained.<sup>35</sup>

*The Prosecution does not request the introduction into evidence of the paragraph identified below in the prior recorded testimony of P-0016*

15. Should the Chamber admit P-0016's prior recorded testimony into evidence, the Prosecution will not rely on paragraph 40 of her statement, in which P-0016 provides a physical description of Mr Abd-Al-Rahman.<sup>36</sup>

(iii) *Prior Recorded Testimony of P-0039*

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<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED].

16. The Prosecution seeks to submit into evidence P-0039's prior recorded testimony, including the associated material listed in Annex A (A3) to this Application. P-0039's prior recorded testimony consists of one witness statement and 12 associated items that relate to information and events discussed in the statement. P-0039's account is relevant, *inter alia*, to the contextual elements of crimes against humanity, in particular the GoS supplying and supporting the Militia/*Janjaweed*.<sup>37</sup>

17. P-0039, [REDACTED] from Beida, provides information on the local administrative structure of Beida,<sup>38</sup> attacks by GoS Forces and the Militia/*Janjaweed* on Beida and surrounding areas from July to November 2003,<sup>39</sup> the refusal of the GoS to register complaints from villagers<sup>40</sup> and GoS training, payment and distribution of weapons to the Militia/*Janjaweed*.<sup>41</sup> P-0039 also describes GoS recruitment of the Militia/*Janjaweed* into the Popular Defence Forces ("PDF") through Arab tribal leaders and coordination between GoS Forces and the Militia/*Janjaweed*.<sup>42</sup> P-0039 witnessed a visit from Abdel Raheem Muhammad Hussein ("Hussein") to Beida to meet with GoS Forces and the Militia/*Janjaweed*.<sup>43</sup> During Hussein's visit, P-0039 heard him pledge that the GoS would provide horses, camels and ammunition to the Militia/*Janjaweed*.<sup>44</sup> P-0039 further describes a visit from Harun to Beida in which he gave a speech promised to provide horses, camels and guns to the Militia/*Janjaweed*.<sup>45</sup>

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<sup>37</sup> [REDACTED].

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

<sup>40</sup> [REDACTED].

<sup>41</sup> [REDACTED].

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> [REDACTED].

<sup>45</sup> [REDACTED].

18. P-0039's associated material consists of: (i) a map of Beida that P-0039 drew during his interview;<sup>46</sup> (ii) [REDACTED];<sup>47</sup> (iii) [REDACTED];<sup>48</sup> (iv) [REDACTED];<sup>49</sup> and (v) seven photographs of a [REDACTED].<sup>50</sup>

(iv) *Prior Recorded Testimony of P-0040*

19. The Prosecution seeks to submit into evidence P-0040's prior recorded testimony, including the associated material listed in Annex A (A4) to this Application. P-0040's prior recorded testimony consists of one witness statement and seven associated items that relates to information and events discussed in the statement. P-0040's account is relevant, *inter alia*, to the understanding of the background of the armed conflict in Darfur, including local administrative and tribal structures,<sup>51</sup> and the contextual elements of war crimes and crimes against humanity, particular GoS support for the Militia/*Janjaweed*.<sup>52</sup>

20. P-0040, a [REDACTED],<sup>53</sup> provides background information on the armed conflict in Darfur, in particular the roles of local and tribal administrative structures,<sup>54</sup> including the meaning of the term *agid al-ogada*,<sup>55</sup> and the PDF.<sup>56</sup> P-0040 describes the GoS recruiting the Militia/*Janjaweed* through Arab tribal leaders and providing them with uniforms, vehicles, identification cards, weapons, training and payment.<sup>57</sup>

21. P-0040 further describes the formation of an Advisory Committee by tribal leaders to investigate various attacks by GoS Forces and the Militia/*Janjaweed*

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<sup>46</sup> [REDACTED].

<sup>47</sup> [REDACTED].

<sup>48</sup> [REDACTED].

<sup>49</sup> [REDACTED].

<sup>50</sup> [REDACTED].

<sup>51</sup> [REDACTED].

<sup>52</sup> [REDACTED].

<sup>53</sup> [REDACTED].

<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].

<sup>57</sup> [REDACTED].

throughout West Darfur in 2003.<sup>58</sup> [REDACTED].<sup>59</sup> P-0040 also describes mediation efforts between tribal leaders to end the attacks by GoS Forces and the Militia/*Janjaweed* that were ultimately not successful.<sup>60</sup> [REDACTED].<sup>61</sup> P-0040 mentions additional visits to Al Geneina by Harun<sup>62</sup> and Hussein.<sup>63</sup>

22. P-0040's associated material consists of: (i) [REDACTED];<sup>64</sup> (ii) [REDACTED];<sup>65</sup> (iii) [REDACTED];<sup>66</sup> (iv) [REDACTED];<sup>67</sup> (v) [REDACTED];<sup>68</sup> (vi) [REDACTED];<sup>69</sup> and (vii) a timeline of burned villages in Darfur from 1996 to 2003.<sup>70</sup>

B. The Prior Recorded Testimonies are admissible under rule 68(2)(b)

23. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence pursuant to rule 68(2)(b) of the Rules are relevant, reliable and probative.<sup>71</sup>

24. In addition to being mainly corroborative in nature and internally consistent, the Prior Recorded Testimonies of the Four Witnesses bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.<sup>72</sup> The Four Witnesses have signed their Prior Recorded Testimonies, attesting that their testimony was given voluntarily and its contents are true to their best knowledge and recollection.<sup>73</sup> These Prior Recorded Testimonies also contain

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<sup>58</sup> [REDACTED].

<sup>59</sup> [REDACTED].

<sup>60</sup> [REDACTED].

<sup>61</sup> [REDACTED].

<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED].

<sup>68</sup> [REDACTED].

<sup>69</sup> [REDACTED].

<sup>70</sup> [REDACTED].

<sup>71</sup> *Gbagbo & Blé Goudé* Prosecution's Rule 68(2)(b) Application, [ICC-02/11-01/15-950-Red](#), para. 22.

<sup>72</sup> *Ntaganda* Prosecution Rule 68(2)(b) Application, [ICC-01/04-02/06-1730-Red](#), para. 13; *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), paras. 17-19; *Gbagbo & Blé Goudé* Appeals Judgment on Rule 68(2)(b) Decision, [ICC-02/11-01/15-744 OA 8](#), para. 3.

<sup>73</sup> [REDACTED].

interpreters' signatures and certifications that the interviews were orally translated into a language that they speak and understand.<sup>74</sup>

C. The Prior Recorded Testimonies of the Four Witnesses are cumulative to, and corroborated by, evidence to be provided by viva voce witnesses

25. The Prior Recorded Testimonies of the Four Witnesses regarding the background of the armed conflict in Darfur and the contextual elements of crimes against humanity are cumulative in nature and corroborative of the evidence that will be provided by *viva voce* witnesses,<sup>75</sup> as described below.

26. The evidence provided by P-0010 and P-0016 regarding the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population, is cumulative to and corroborated by *viva voce* witnesses, including in particular [REDACTED].

27. The evidence provided by P-0039 and P-0040 regarding the background of the armed conflict in Darfur and the contextual elements of crimes against humanity is cumulative to and corroborated by *viva voce* witnesses, including in particular [REDACTED].

D. The introduction of the Prior Recorded Testimonies of the Four Witnesses is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman

28. The introduction into evidence of the Prior Recorded Testimonies of the Four Witnesses would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman. The Prior Recorded Testimonies of the Four Witnesses are limited to background information regarding the armed conflict in Darfur and the contextual elements of crimes against humanity, which are issues not materially in dispute<sup>76</sup>

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<sup>74</sup> [REDACTED].

<sup>75</sup> See Bemba Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

<sup>76</sup> Ongwen Rule 68(2)(b) Decision on Prosecution Witnesses, [ICC-02/04-01/15-596-Red](#), para. 15.

between the Prosecution and the Defence.<sup>77</sup> The Prior Recorded Testimonies also do not relate to the acts and conducts of Mr Abd-Al-Rahman, as set out in the jurisprudence of the Court.<sup>78</sup> The evidence regarding Mr Abd-Al-Rahman in the Four Witnesses' statements is limited to his physical description, which the Prosecution has excluded from the Application.<sup>79</sup>

29. Furthermore, the Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the Prior Recorded Testimonies of these witnesses, lead contradictory evidence during the Defence case or advance arguments regarding the weight to be attributed to the Prior Recorded Testimonies to the extent that discrepancies with any other evidence exist.

30. The Prosecution consulted the Defence regarding its Application to admit the Prior Recorded Testimonies of the Four Witnesses into evidence pursuant to rule 68(2)(b). The Defence agreed to the use of rule 68(2)(b) for P-0010<sup>80</sup> but did not agree to the use of rule 68(2)(b) for the remaining witnesses.<sup>81</sup> The mere lack of agreement from the Defence does not prevent the introduction of the Prior Recorded Testimonies, nor does it necessarily follow that their introduction would be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.<sup>82</sup>

#### IV. CONCLUSION

<sup>77</sup> See e.g. Agreed Facts 6-7, Annex A to Second Joint Submission on Agreed Facts, [ICC-02/05-01/20-343-AnxA](#).

<sup>78</sup> *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), para. 12; *Gbagbo & Blé Goudé* Rule 68(2)(b) Decision, [ICC-02/11-01/15-950-Red](#), paras. 19-20, 29, 36-37; *Ntaganda* Rule 68(2)(b) Decision, [ICC-01/04-02/06-1715-Red](#), paras. 13-14.

<sup>79</sup> See para. 15 above.

<sup>80</sup> Email from the Defence to the Prosecution, "Re: Provisional list of Rule 68 witnesses", 26 January 2022 at 07:08.

<sup>81</sup> See Email from the Defence to the Prosecution, "Re: Provisional list of Rule 68 witnesses", 20 January 2022 at 10:24 (regarding P-0039 and P-0040); Email from the Defence to the Prosecution, "Re: Provisional list of Rule 68 witnesses", 26 January 2022 at 07:08 (regarding P-0016).

<sup>82</sup> *Ongwen* Rule 68(2)(b) Decision on Defence Witnesses, [ICC-02/04-01/15-1322-Red](#), paras. 6-7, 9-10.

31. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application subject to the fulfilment of the further conditions of rule 68(2)(b) of the Rules.



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**Karim A. A. Khan QC**  
**Prosecutor**

Dated this 7<sup>th</sup> day of February 2022

At The Hague, The Netherlands